Nos. 18887 and 18888

IN THE

United States

Court of Appeals

For the Ninth Circuit

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor,

Appellant,

vs.

IDAHO SHEET METAL WORKS, INC., A Corporation,

Appellee

Appeal from the District Court of the United States For the District of Idaho

---

BRIEF FOR APPELLEE

ELI A. WESTON, *Attorney*
and
VESTAL COFFIN, *Associate Attorney*
Idaho Sheet Metal Works, Inc.

IN THE

United States

Court of Appeals

For the Ninth Circuit

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor,

Appellant,

vs.

IDAHO SHEET METAL WORKS, INC., A Corporation,

Appellee

Appeal from the District Court of the United States For the District of Idaho

---

BRIEF FOR APPELLEE

ELI A. WESTON, *Attorney*
and
VESTAL COFFIN, *Associate Attorney*
Idaho Sheet Metal Works, Inc.

INDEX

CITATIONS

Cases:

IN THE

United States
Court of Appeals
For the Ninth Circuit

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor, *Appellant*, vs. IDAHO SHEET METAL WORKS, INC., A Corporation, *Appellee*	Nos. 18887 and 18888

Appeal from the District Court of the United States For the District of Idaho

BRIEF FOR APPELLEE

STATEMENT OF JURISDICTION

The appellant has correctly stated the facts with reference to jurisdiction, the above cases coming under Sections 16(c) and 17 of the Fair Labor Standards Act with particular reference to Sections 6 and 7 covering minimum wages and overtime. The two actions were consolidated for trial (A 30)[1] at

[1]Page numbers preceded by "A" refer to Volume 1 of the record on appeal in Cause No. 18887; page numbers preceded by "B" refer to the record on appeal in Cause No. 18888; page numbers preceded by "T" refered to the transcript of proceedings at the trial of these cases, which has been designated as Volume 2 of the record of Cause No. 18887.

the conclusion of which the Court held that the defendant's employees were not within the coverage of the Act and further that the defendant's enterprise was an exempt establishment. (A 58-A 61; B 24-B 27).

STATEMENT OF THE CASE

Th defendant in this case operates a sheet metal shop in a small agricultural area, Burley, Idaho. The shop was established in 1957 and was established for the purpose of serving the local community's needs in the custom fabrication and making of sheet metal or tin items to be sold or installed for the general public including merchants, farmers, individuals, and in some instances, manufacturers. The products were all made and sold at a retail price computed by adding a profit to the cost of labor and materials. The shop was and is an enlarged projection of the oldtime tin shop and was described by the manufacturing salesmen in the industry as the retail outlet.

Some time after the shop was established, manufacturers of frozen food products located in the community and intermittently at irregular intervals used the facilities of the defendant for the installation of items such as air ducts, air conditioning equipment, storage tanks, elevator buckets, endless conveyor belts, conductors, and chutes.

The shop and building is equipped with a counter, work benches, and racks for the display and storage of products such as sheet metal, tubing, tin and other objects.

Section 3 of the Act provides that ". . . an employee shall be deemed to have been engaged in the production of goods if the employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, *or in any closely related process or occupation directly essential to the production thereof, in any state.*" (emphasis added) The above is the 1949 amendment to the original Act. The original Act did not contain the words "or in any closely related process or occupation directly essential," but contained the expression "any process or occupation necessary to the production thereof." Congress by the amendment intended to eliminate the confusion and difficulties where coverage had previously been held in occupations that were not closely related to or directly essential to the production of goods for commerce.

The instant cases pose two questions:

1. Are the employees working for an independent employer such as the defendant so closely related and directly essential to the production of goods for commerce as to be engaged in the production of goods for commerce?

2. Is the defendant's shop a retail establishment and entitled to the exemption as such under Section 13(a) of the Act?

SECTION 13(a)

Section 13(a) of the Act provides an exemption for the defendant regardless of Section 3 if the evidence establishes that the employees in question were

employed in an establishment meeting the following requirements:

1. 50% of the annual dollar volume of sales are made within the state.

2. 75% of the annual dollar volume of sales or services or of both is not for resale.

3. It is recognized as a retail sales or service establishment in the particular industry.

4. 85% of such establishment's annual dollar volume of sales of goods so made or processed is made within the state in which the establishment is located. (Section 13(a)(4)).

> "It is well settled that the findings of fact of a lower court will not as a general rule be disturbed by the appellate court unless they are clearly contrary to, or are plainly, flagrantly, or indisputably against, the evidence, or are so clearly contrary to the preponderance of the evidence as to produce in the minds of the reviewers a conviction amounting to a reasonable certainty that they are wrong."
>
> 3 Am. Jur. 458 ¶ 896 (citations omitted)

In addition, it is also the general rule that in the review of a judgment of the trial court based upon findings made by that court, all reasonable presumptions are to be indulged in favor of the correctness of the findings. *Martin v. Marks*, 97 U.S. 345, 24 L. Ed. 940; *Hodges v. Meriwether*, 55 F. 2d 29 (CCA 8th, 86 ALR 52). Testimony in the record which tends to support the findings must be accepted as true and

must be viewed most favorably to the conclusions or findings of the court below. *Tri-State Transit Company v. Miller*, 188 Ark. 149, 65 SW 2d 9, 90 ALR 1389; *Shean v. Cook*, 180 Cal. 92, 179 Pac. 185, 3 ALR 1042. Based upon these cases and authorities, if there is any evidence or testimony in the record tending to support the findings of fact of the trial court, the findings may not be disturbed.

Therefore, the issues to be determined on this appeal are whether or not there are facts in the record to support the following findings of fact:

1. The defendant's store is isolated and local in character.

2. The defendant's services rendered or goods furnished were intermittent and irregular and were not directly essential to the regular operation of the interstate producer.

3. The defendant's prices for services and products were not for resale, and were sold at retail.

4. The defendant's establishment is recognized as a retail establishment within the industry.

5. 85% or more of the defendant's products or services were rendered or sold within the state.

ARGUMENT

The pre-trial agreement provided that all tests applying to retail establishments had been met except the tests of 75% at retail and whether the store

was recognized as a retail sales or service establishment within the industry and whether 85% of the establishment's annual dollar volume of sales or goods are made within the state in which the establishment is located. There is no question with reference to compliance with this last provision, and the issue was not raised in the trial.

Throughout its entire brief, we find the Government relying on the *Roland Electrical Company* case, decided in the early part of 1946 and not covered by the 1949 amendments. There is a substantial difference between the cases referred to by the Government and the more recent cases which will be referred to herein and which were decided after the 1949 amendments. Before 1949, the law loosely suggested that any employee who was in any way connected with or necessary to the production of goods for commerce was covered. Since the 1949 amendments, the Government has struggled to retain the old rule and is reluctant to interpret the 1949 amendments as intended by Congress. The amendments specifically provide, and recent cases hold, that the employee in question must not only engage in work essential to production but it must also be closely related to production of goods *in* commerce.

Before 1949, the cases drew little or no distinction between the employer who was engaged in serving the general public and the employer who was established for the precise and exact purpose of servicing and supplying the employer who was engaged in interstate commerce.

The cases before 1949 drew little or no distinction between the employer who serviced or sold goods to an employer intermittently or at unpredictable intervals as compared to the employer who was required to service and sell at regular times and without interruption of service.

Finally, the cases before 1949 drew very little, if any distinction between the employer whose employees produced goods *in* commerce as compared to those who might be termed as producing goods *for* commerce.

The *Roland Electrical* case, decided before 1949, involves services and supplies by an independent employer (electrical motors and other electrical equipment) which were an essential part of the equipment producing goods in interstate commerce; and the services were necessary daily or regularly to carry on the work of the interestate commerce producing employer. Every mechanic of the Roland Electrical Company worked in practically every work week either in the repairing of the motors and generators or on the reconstruction of used motors sold to the company. The facts also show that the sales and services had to be immediately available at all times. The Roland Electrical Company was not established to serve a local demand and had no history or background as a retail establishment serving a local need. An examination of the facts in the *Roland Electrical Company* case shows they are inapplicable to the case at hand. While the *Roland* case has been referred to in decisions since 1949, it has been in

connection with facts other than those apparent in the present case.

The Government has referred to other cases, some decided before 1949 and some afterward; but it is significant to point out that all the cases show either:

1. That the company involved was furnishing materials that actually went *into* the product produced for commerce, or

2. That the company involved furnished a service at regular and stated intervals and that the service or materials were necessary to keep the company in operation, or

3. That the company involved was not a local establishment established to serve the general public but was established for the specific purpose of selling or servicing the needs of the company producing for commerce.

For example, see *General Electric Co. v Porter*, 208 F. 2d 805 (CA-9) (1953). In this case a facility was established for the express purpose of providing meals at a government installation.

In the case of *Chambers Construction Co. v. Mitchell*, 233 F. 2d 717 (CA-8), the principal question involved was whether the construction was new or old.

In *Reynolds v. Salt River Valley Users' Ass'n*, 143 F. 2d 863 (CA-9), decided before 1949, the employees in question were employed in the single and necessary occupation of pumping water to irrigate land producing goods for commerce.

In *Mitchell v. Anderson*, 235 F. 2d 638 (CA-9), we

find the defendant operating a mess hall under an agreement in a small isolated California town for the express purpose of serving the interstate producer meals for its employees.

For some reason, known to the Government only, they have failed to bring us up to date and have failed to comment on what we consider the latest pronouncements of the Supreme Court on this important question.

The facts in the instant cases show, and the Court by its findings held:

1. That the defendant company was established as a local concern for the express purpose of serving the general public in and around the Burley area including local businesses, farmers and other customers, (T. pp 59, 64, 74).

2. That although the dollar volume of sales to interstate producers is temporarily larger, the total number of customers and sales and services to the general public grossly exceeds those to interstate producers. (Tr. pp 78, 79, 65).

3. That the services rendered to the interstate producers are intermittent, changeable, irregular, and for the most part, rendered during the time the companies are not producing or operating and are in the so-called "down period" (about three months per year). (T. pp. 78, 81-83)

4. That none of the goods sold by the defendant move in interstate commerce. (T. p 83)

5. That the services rendered are for the most part concerned with the smaller items of equipment in the plants of the interstate producers, such as guards for electrical motors, ventilators, tin and steel repair work and in some instances, repairing of elevator belts and equipment, and that any major installations or prefabrications are manufactured in Boise and not by the defendant company. (T. pp. 55, 56)

6. That the interstate producing companies have facilities for, and could if they wished, make the repairs and furnish the services furnished by the defendant company. The interstate producers prefer to patronize local establishments. (T. p. 84)

From an examination of these facts, it would appear that the cases referred to in the Government's brief do not meet the issue. The exhaustive analysis and carefully prepared decision written by Justice Frankfurter in the case of *Mitchell v. H. P. Zachry Co.*, 362 U.S. 310, shows the correct interpretation and intent of the 1949 amendments.

In the *Zachry* case, the employees in question were employed by an independent employer constructing a dam to increase the reservoir capacity to create an expanded reservoir for the district. The water impounded by the district was supplied partially to consumers locally within the State of Texas, including a city. Approximately 40% to 50% of all the water consumed from the system is accounted for by industrial or interestate users, and it is agreed the water is essential to these operations.

In the *Zachry* case, as in the instant case, the facility was constructed to serve a local purpose, but at the same time it furnished water to firms that were engaged in production of goods for commerce. Justice Frankfurter in deciding the case ruled that even though the water was "directly essential" to the production of goods for commerce, the employer's operation was not "closely related" as it had the attributes of a local establishment and was therefore not directly essential to the production of goods for commerce.

The evidence in the case before this Court shows that the defendant establishment has a background and history of a local establishment inaugurated for the purpose of serving the local needs. The evidence shows that the requirements by the interstate producers were irregular and intermittent. The evidence shows that the interstate producers operate on a seasonal basis and that the services of the defendant are not required at all times; and further, that the interstate producers are for the most part in a new Idaho industry. We call attention to the testimony of the Government's main witness, Harrison Grathwohl, wherein he admits that without the business of the interstate producers, the defendant would in fact be a retail establishment. (T. p. 117) This witness also admitted the defendant does practically the same things the old timers did in tin shops. (T. p. 112)

In the *Zachry* case the Court, in commenting on the *Kirschbaum* and other cases, including the H. R. Conf. Rep., Cong. Rec. 14875, stated:

"But no illustration in either statement deals with construction of a dam designed solely for use as an impounding facility for a local water distribtion system."

And commenting on the 1949 amendment, the Court stated:

". . . To do so requires that we once again apply the formulation set down in *Kirschbaum*, which in the light of the 1949 amendment, we must do with renewed awareness of the purpose of Congress to avoid intrusion into withdrawn local activities."

And again the Court states in commenting on *Mitchell vs. Lublin, McGaughy & Associates*, 358 U.S. 207, and *Mitchell vs. Vollmer & Co.*, 349 U.S. 427: (In each of these cases a construction activity was found to be directly and vitally related to commerce, and they are not useful guides here.)

"What is finally controlling in each case is the relationship of the employment to 'commerce,' in the sense of the statute, and it needs no argument that as to that relationship this case is significantly different from *Lublin* or *Vollmer*."

And further on, the Court states:

"Moreover, though construction and operation of this dam are equally 'directly essential' to the producers who require the water impounded and distributed, neither the construction or the operation of the dam is designed *for their use.* (emphasis added) Water is supplied by the District to a mis-

cellany of users throughout its geographical area, and somewhat less than half of the consumption is by producers."

This differentiates the case from the *Farmers Reservoir* case.

In commenting on the *Alstate Construction Co. v. Durkin*, 345 U.S. 13, the Court concludes:

". . . It is a sufficient answer to this contention that the record is devoid of evidence of a purposeful and substantial dedication of otherwise local production to consumption by 'commerce' which was the basis of our decision in *Alstate*."

The rationale of Justice Frankfurter in the *Zachry* case (supra) draws a clear distinction between the cases decided before the 1949 amendment and those decided after. We quote from the *Zachry* decision:

"While attempted formulas of the relationship to production required for coverage cannot furnish automatic or spontaneous answers to specific problems of application as they arise in their protean diversity, general principles of the Act's scope afford direction of inquiry by defining the broad bounds within which decision must move. * * * For the Act also manifests the competing concern of Congress to avoid undue displacement of state regulation of activities of a dominantly local character. Accommodation of these interests was sought by the device of confinement of coverage to employment in activities of traditionally national

concern. The focus of coverage became 'commerce,' not in the broadest constitutional sense, but in the limited sense of §3(b) of the statute: 'trade, commerce, transportation, transmission or communication among the several States . . .' "

Then Justice Frankfurter engages in a discussion of the distinction between employment "in commerce" as compared to production "for commerce" and suggests that each step becomes more remote and less related to commerce. The Justice reasons that employment "in" commerce is the least affected by local interests and that the next step removed from employment "in" commerce is employment "in" production which is "for" commerce.

The Court goes on to state:

"Furthest removed from 'commerce' is employment not 'in' production 'for' commerce but in an activity which is only 'related' to such production . . ."

And while the Court held coverage in *Mitchell v. Independent Ice and Cold Storage Company*, 294 F 2d 186 (CA-5) (1961), this was distinguished from the *Zachry case*. In the *Independent Ice* case, the suppliers had no history as a retail establishment nor was it set up to furnish services to local users. In the case of *Public Building Authority of Birmingham v. Goldberg*, 298 F. 2d 367 (1962), the Court again in referring to the *Zachry* case, drew a distinction between an establishment set up to serve an interstate

producer and an establishment local in nature and set up to serve the locality.

Under Title 29, Chapter V, Wage and Hour Division of the Department of Labor, Part 776 of the Code of Federal Regulations, the Administrator has issued Interpretative Bulletins for the purpose of construing and interpreting the Act for enforcement purposes. Under Bulletin 776.17, entitled "Employment in a 'Closely Related Process or Occupation Directly Essential to' Production of Goods.":

> "(a) Coverage in General. Employees who are not actually 'producing * * * or in any other manner working on' goods for commerce are, nevertheless engaged in the 'production' of such goods within the meaning of the Act and therefore within its general coverage if they are employed 'in any closely related process or occupation directly essential to the production thereof, in any State.' Prior to the Fair Labor Standards Amendments of 1949, this was true of employees engaged 'in any process or occupation necessary to the production' of goods for commerce. The Amendments deleted the word 'necessary' and substituted the words 'closely related' and 'directly essential' contained in the present law. The words 'directly essential' were adopted by the Conference Committee in lieu of the word 'indispensable' contained in the Amendments as first passed by the House of Representatives. Under the amended language, an employee is covered if the process or occupation in which he is employed is *both* 'closely related' *and*

'directly essential' to the production of goods for interstate or foreign commerce.

"The legislative history shows that the new language in the final clause of section 3(j) of the Act is intended to narrow, and to provide a more precise guide to, the scope of its coverage with respect to employees (engaged neither 'in commerce' nor in actually 'producing or in any other manner working on' goods for commerce) whose coverage under the Act formerly depended on whether their work was 'necessary' to the production of goods for commerce. Some employees whose work might meet the 'necessary' test are now outside the coverage of the Act because their work is not 'closely related' and 'directly essential' to such production; others, however, who would have been excluded if the indispensability of their work to production had been made the test, remain within the coverage under the new language.

"The scope of coverage under the 'closely related' and 'directly essential' language is discussed in the paragraphs following. In the light of explanations provided by managers of the legislation in Congress, including expressions of their intention to leave undisturbed the areas of coverage established under court decisions containing similar language, this new language should provide a more definite guide to the intended coverage under the final clause of section 3(j) than did the earlier 'necessary' test. However, while the coverage or noncov-

erage of many employees may be determined with reasonable certainty, no precise line of inclusion or exclusion may be drawn; there are bound to be borderline problems of coverage under the new language which cannot be finally determined except by authoritative decisions of the courts."

In paragraph (b) we find the following statement:

"(b) Meaning of 'Closely Related' and 'Directly Essential.' The terms of 'closely related' and 'directly essential' are not susceptible of precise definition; as used in the Act they together describe a situation in which, under all the facts and circumstances, the process or occupation in which the employee is employed bears a relationship to the production of goods for interstate or foreign commerce (1) which may reasonably be considered close, as distinguished from remote or tenuous, and (2) in which the work of the employee directly aids production in a practical sense by providing something essential to the carrying on in and effective, efficient, and satisfactory manner of an employer's operations in producing such goods . . ."

Under paragraph (c), subparagraph (2):

"(2) The determination of whether an activity is closely or only remotely related to production may thus involve consideration of such factors, among others, as the contribution which the activity makes to the production; who performs the activity; where, when and how it is performed in relation to the production to which it pertains;

whether its performance is with a view to aiding production or for some different purpose; how immediate or delayed its effect on production is; the number and nature of any intervening operations or processes between the activity and the production in question; and, in an appropriate case, the characteristics and purposes of the employer's business. Moreover, in some cases where particular work 'directly essential' to production is performed by an employer other than the producer, the degree of such essentiality may be a significant factor in determining whether the work is also 'closely related' to such production."

In Bulletin 776.18, paragraph (b), we find the following:

"(b) Employments Not Directly Essential to Production Distinguished. Employees of a producer of goods for commerce are not covered as engaged in such production if they are employed solely in connection with essentially local activities which are undertaken by the employer independently of his productive operations or at most as a dispensable, collateral incident to them and not with a view to any direct function which the activities serve in production . . . "

In Bulletin 776.19 we find:

"(a) General Statement. (1) If an employee of a producer of goods for commerce would not, while performing particular work, be 'engaged in the production' of such goods for purposes of the

Act under the principles heretofore stated, an employee of an independent employer performing the same work on behalf of the producer would not be so engaged . . . "

"(a) (3) . . . it may appear that his performance of the work is so much a part of an essentially local business carried on by his employer without any intent or purpose of aiding production of goods for commerce by others that the work, as thus performed, may not reasonably be considered 'closely related' to such production . . . "

The State of Idaho still retains control over purely local businesses and establishments. The Government should use caution not to invade or usurp the local control of a purely local business.

RETAIL ESTABLISHMENT EXEMPTION—Section 13(a)(2) and (4)

The remaining issues stipulated at the pre-trial hearing are:

1. Whether the defendant's business is, by nature, outside the retail concept, and

2. Whether the defendant's employees are exempt from the overtime requirements of the Act by virtue of their employment by a "retail or service establishment" as defined in Sections 13(a)(2) and 13(a)(4) of the Act. Essentially, these sections of the Wage and Hour Law provide that an employer must meet the following six standards before the retail exemption will be applied to his business operations:

(1) Over 50% of the establishment's annual dollar volume of sales must be made within the state in which the establishment is located.

(2) At least 75% of the establishment's annual dollar volume of sales must be to purchasers who do not buy for resale.

(3) At least 75% of the establishment's annual dollar volume of sales must be recognized in the particular industry as retail sales.

(4) The establishment must be recognized as a retail establishment in the particular industry.

(5) The goods which the establishment makes or processes must be made or processed at the establishment which sells them.

(6) More than 85% of the establishment's annual dollar volume of sales of goods which it makes or processes must be made within the state in which the establishment is located.

Counsel for the plaintiff has conceded that defendant meets requirements (1), (2), (5) and (6).

However, *Mitchell v. Kentucky Finance Company*, 359 U. S. 291, 3 L. Ed. 2d 615 (1959), imposes an additional requirement. This case holds that a court must make a preliminary factual determination as to whether or not the industry is outside the traditional retail concept before turning to the tests of 13(a)(2) and (4). This preliminary test is based upon the prior status of the industry in question. Thus, if the courts or the administrator have labeled

the industry in question as being non-retail in character, this status continues and the requirements of Sections 13(a)(2) and (4) will not be applied.

> "We find nothing in the debates or reports which suggests that Congress intended by the amendment to broaden the field of business enterprise to which the exemption would apply. Rather, it was time and again made plain that the amendment was intended to change the prior law only by making it possible for business enterprises otherwise eligible under existing concepts to achieve exemption even though more than 25 per cent of their sales were to other than private individuals for personal consumption, provided those sales were not for resale and were recognized in the field or industry involved as retail." (at page 294)

However, before inquiring as to the traditional status of an industry, the industry under consideration must first be defined and categorized.

Briefly stated, it is defendant's contention that:

(1) The industry herein under consideration is the "custom sheet metal industry;"

(2) This industry has not been determined by the administrator or the courts as "non-retail;"

(3) Counsel for the plaintiff's basis for defining this industry is based upon the repudiated "business use test;" and

(4) All witnesses testifying on the retail exemption issue stated that this industry has a traditional concept of being retail in nature.

We would respectfully submit that the transcript clearly shows that the industry under consideration is the custom sheet metal and building industry. (T. pp. 44, 54, 69, 72)

The testimony of Mr. Herbert Shockey and Mr. Vestal Coffin, both of whom are employed in the industry and familiar with its background and evolution, testified that this industry is separate and distinct from other operations using sheet metal. (T. pp. 63-76)

The attributes and distinct characteristics of this industry were very succinctly brought out in cross examination. (T. p. 74).

This and other testimony adduced at the trial show that we have a local industry servicing the general public with a certain type of product that cannot be found elsewhere. It is not a manufacturer in the strict sense of that word in that its products are all customized and are not made from standard forms nor built on a production-line basis. (T. pp 47, 48) Nor is it a hardware store in that it does not purchase its products from manufacturers or wholesalers. It is a specific, well defined area of operation referred to as a "custom sheet metal industry."

In another portion of the transcript, Mr. Shockey, president of the defendant corporation, again reiter-

ated the precise area in which this industry operates, showing a retail custom shop. (T. pp 53, 54).

Once the industry under consideration has been defined, the next question is: What is its traditional status?

In researching the question, the author has yet to find an interpretive bulletin or manual wherein the "custom sheet metal industry" has been determined by the administrator or the courts. Counsel has correctly pointed out "machine shops," "industrial blacksmiths," "establishments engaged in reconditioning industrial tools," and "establishments engaged in resistance welding" have all been mentioned as not being retail in nature.

We would respectfully submit that the testimony in the case at bar clearly shows that the industry under consideration is not in any of the above categories. In addition, the cases that the administrator has apparently used in determining that establishments engaged in selling or servicing of construction, mining, manufacturing, and industrial machinery have been over-ruled by the 1949 amendment. In the interpretive bulletin above-cited, these industries were recognized as non-retail on the authority of the following cases:

> *Roland Electric Company v. Walling*, 325 U. S.657; *Guess v. Montague*, 140 F. 2d 500; *Walling v. Thompson*, 65 F. Sup. 686.

In the *Roland* case, supra, the employer was engaged in the work of repairing electrical motors and

generators, the reconstruction of used motors, and performing electrical work at the different establishments. The United States Supreme Court in dealing with the retail exemption issue, held that since the employer here was engaged in selling his products to commercial users, rather than to people for their personal use, no exemption could be granted. This then was the evolution of the "business use test." In the *Montague* case, Supra, the employer was engaged in manufacturing and repairing machinery. This Court also applied the "business use test" and held that since the ultimate consumer was an industrial concern, the exemption could not be applied. In the *Thompson* case, supra, the employer was engaged in the business of installation, servicing and repair of burglar alarm systems, leased and serviced by the employer to firms and concerns wholly within the State of California. This Court also applied the "business use test" in the following language:

> ". . . It may be broadly stated that the 'retail' character of the employer is not to be determined by the nature of the employer's business exclusively, but also, whether the final purchaser uses the services or commodity to satisfy a personal want or necessity; or uses it to satisfy a business necessity."

It should be noted first that we are not "industrial backsmiths," "machine shops," or engaged in reconditioning of industrial tools or resistance welding. Secondly, the test by which these industries were con-

sidered non-retail has been discarded by virtue of the 1949 amendment to the Act.

Senators Taft and Donnell, members of the Labor and Public Welfare Committee, supplemented the Committee's report with views of their own. After discussing the test established in *Roland Electric Company v. Walling*, supra, they said:

> "There is no sound basis to distinguish, in determining whether or not a sale is retail, between sales to customers for personal use and sales to customers for business use. Accordingly, it is our view that concurrently with any increase in the minimum wage, Section 13(a)(2) of the law should be amended to remove such distinction."
>
> (U.S. Code Cong. Serv., 81st Cong., 1st Session, 1949, p. 2251)

In the House Conference Report concerning the same amendment, it was said:

> "The third test provides that 75% of the establishment's annual dollar volume of sales of goods or services (or of both) must be recognized in the particular industry as retail sales or services. Under this test any sale or service, *regardless of the type of customer*, will have to be treated by the administrator and courts as a retail sale or service, so long as such sale or service is recognized in the particular industry as a retail sale or service." (id. p. 2264)

As a matter of fact, *Mitchell* v. *Kentucky Finance*

Company, supra, cited by plaintiff, affirms the intent of Congress to repudiate the business use test. In another case cited by counsel for the plaintiff, *Goldberg* v. *Roberts*, 291 F. 2d 532, (9th Cir-1961), the following was stated with regard to those industries classified by the business use test:

> "* * * Its holding is that where it has been established by pre-amendment (i.e., pre-1949) interpretation that an industry is not retail, *unless that classification was due to an application of the business use test, that industry is not now exempt.*"

Therefore, even if by any stretch of the imagination, the industry under consideration could be classified in the same general definition of "industrial blacksmiths" etc., we submit that this classification has been overruled by the repudiation of the business use test.

In connection with the traditional or original concept of this business, several witnesses testified as to how it is considered from the standpoint of its history. (T. P. 51) In addition to the testimony of Mr. Shockey and Mr. Coffin, counsel for the plaintiff's expert, Mr. Grathwohl, concurred with the opinions of Mr. Coffin and Mr. Shockey with regard to this prior status. (T. p. 112)

This testimony is of material significance in asserting our position that we have a traditional or original concept of retail operation. If, as Dr. Grathwohl conceded, the old tin shop in the bottom of the hardware store was a retail operation, and work they did then

is the same as the work they do now, it would seem to follow that they do retail work now. It is apparent that Dr. Grathwohl was making his distinction not upon the type of work they engage in but upon the type of customer who uses the product, or in other words, the business use test.

Therefore, the "preliminary determination" of the *Kentucky Finance* case, supra, has been satisfied, in that the "custom sheet metal industry" has no pre-1949 status. Since the determination required by the *Kentucky Finance* case, supra, is essentially a preliminary fact determination, the next question is whether or not there are any factors inherent in the operation of this industry which would deny it a retail concept. As previously stated, Idaho Sheet Metal Works is engaged in the business of creating objects out of sheet metal per the order of an individual. In all cases the party ordering the equipment is the ultimate consumer of same. Thus, the first question is: Does the factor of custom building place defendant outside the retail concept? In *Snavely et al* v. *Shugart*, 45 F. Sup. 722 (Texas-1942), an employer was engaged in the business of testing eyes, prescribing proper glasses and making and fitting glasses. Here, the Texas Federal District granted the employer a retail exemption. Clearly, prescribing glasses and making them to order for a particular customer is as much if not more a custom operation as constructing a piece of equipment out of sheet metal pursuant to the qualifications of a consumer.

Does the fact that the defendant processes the object to be sold take it out of the retail concept? In light of Section 13(a)(4) of the Act, the factor of building or processing the object is no longer controlling in determining whether or not an establishment is retail in nature.

Does the fact that the defendant has no display windows or stock counters deny it a retail concept? This factor was dealt with in the case of *Lesser* v. *Sertner's Inc.*, 166 F 2d 471 (2d Circuit-1948). In this case the employer was engaged in the business of cleaning, renovating and repairing upholstered furniture, draperies, curtains, rugs, and carpets. This Court, in commenting on the fact that the business under consideration did not look like a retail store, stated the following:

> "In reaching this conclusion, the Court stressed the fact that the conduct of the business was not designed to attract the attention of the consuming public in the manner usually associated with retail establishments, and did not have any of the characteristics 'epitomized by the corner grocery, the drug store, and the department store.'
>
> "Sertner's occupied the entire twelfth floor of a loft building located in a factory neighborhood. The customer whose goods were cleaned and processed rarely came to the premises. It employed about twenty employees, but had no sales clerk to wait on trade, and no display windows to attract the patronage of the general public; * * *

"It is true, as the foregoing facts show, that the appellant's business was not conducted in the manner characteristic of the small retail store, nevertheless, we think it should be held to come within the exemption of Section 13(a)(2). As we read the authorities, the test of whether the local merchant or purveyor of service is operating a retail establishment is the type of customer he has; the volume of his business, the number of his employees or the manner in which trade is attracted and customers obtained is *not* material. If the customers are 'ultimate consumers' of the goods sold or serviced locally, the establishment is retail."

Thus, a determination of whether or not a business establishment has a "retail concept" must not be made upon the basis of whether or not it is manufactured at the place of sale, whether or not it has display windows or counters, nor whether or not the ultimate consumer uses it for his personal use or industrial uses.

Since the preliminary determination of the *Kentucky Finance* case, supra, has been satisfied, we now must turn to the requirements of Section 13(a)(4). Counsel has conceded that four of the tests under this section have been met. The remaining questions then are:

1. Is at least 75% of the establishment's annual dollar volume of sales recognized in the particular industry as retail sales?

2. Is the establishment recognized as a retail

establishment in the particular industry?

Counsel for the plaintiff has stated in the record that there is no showing on the record that 75% of the defendant's sales are not for resale. In answer to this position, we wish to point out that the transcript shows that *all* sales made by the defendant corporation are made to the ultimate consumer of same, and are not for resale. (T. pp. 58, 83, 59, 64, 65, 69, 70, 71, and 73) As a matter of fact, the whole tenor of this business (customized building) would indicate that it is for the specific use of the person buying the object and would not be for resale under any circumstances.

Therefore the remaining issue is whether or not the defendant's sales are considered retail in the industry. In this particular area, the witnesses testifying were Herbert Shockey, the manager of Idaho Sheet Metal Works; Vestal Coffin, accountant and attorney for Idaho Sheet Metal Works; Roderick Law, a salesman for the Alaska Copper and Brass Company, who has sold products to the defendant for seven or eight years; and Lynn A. Lake, branch manager for the Structural Steel and Forge Company in Twin Falls. The sole witness testifying for the plaintiff on the exemption issue was Dr. Grathwohl, who is the recipient of a Doctorate in Business Administration and a marketing specialist. Dr. Grathwohl candidly admitted on cross examination that he had no detailed familiarity with the metal trades industry and that he has never worked in it. (T. p. 114)

In contrast to this testimony, defendant's witness, Vestal Coffin, testified that he has been connected with the defendant's operations since its inception in 1957. (T. p. 58) As a point of background, Mr. Coffin also stated that he has been familiar with this type of industry since his childhood. (T. pp 68, 69) Thus, the transcript clearly discloses that this particular witness is in the industry and by virtue of his varied background is extremely competent to give observations as to the retail or non-retail character of the defendant's establishment. On page 73 of the transcript, Mr. Coffin unequivocally stated that the industry is considered retail.

The next witness was Mr. Clifford P. Jackson, manager of the Idaho Sheet Metal Works, the defendant herein. Mr. Jackson testified on page 80 of the transcript that the defendant establishment is considered retail in the industry.

Mr. Herbert Shockey, owner of the Idaho Sheet Metal Works, stated on page 51 of the transcript:

> "All of my life I have recognized our business as a retail business."

Another witness presented by the defense on the retail exemption issue was Lynn A. Lake, branch manager of the Structural Steel and Forge Company in Twin Falls, Idaho. Mr. Lake testified from pages 88 to 90 stating, in effect, that he has been selling products to the defendant corporation for a period of ten years. Mr. Lake stated that the defendant estab-

lishment is considered retail in the industry. (T. pp. 89, 90, 91)

The next witness was Roderick Law, a salesman for the Alaska Copper and Brass Company in Portland, Oregon. Mr. Law's testimony is reproduced in the transcript from pages 91 to 95. Mr. Law stated that his particular branch of the metal industry considers the defendant to be a retail establishment. (T. p. 91)

The sum total of this evidence leaves little doubt that both people in the industry and those most directly connected with it consider the defendant to be a retail establishment.

Dr. Grathwohl stated that the defendant corporation is not a retail outlet and based his opinion on several general tests applicable to the marketing field.

This opinion was based upon several factors, most of which have been ruled on by the courts. One of the factors he considered relevant was the fact that the defendant did not engage in sales traditionally considered to be retail in that they were not over the counter or door to door type. As mentioned previously, in *Lesser* v. *Sertner's, Inc.*, supra, the fact that an establishment does not have the outward attributes of a retail store is not controlling in granting the exemption.

Another aspect of this business, material to Dr. Grathwohl, was the fact that the defendant processes

its products. At page 106 of the transcript, the Dr. applied the form utility test, the gist of which seems to be that if a retailer manufactures or processes its product, this processing or manufacturing must be only incidental to selling. In other words, if the primary purpose of the establishment is to create a useful form, and selling is only incidental, the establishment is a manufacturer. We would submit that since all products made in the defendant's plant are sold before they are made (customized building), our primary function is sale. Stated another way, we do not disagree with the test but only with its application.

Another test used by the Doctor was: How is the defendant's industry classified in the Standard Industrial Classification Code? (T. pp. 108, 109) On page 110 of the transcript, the Doctor summed up his tests by stating:

> "* * * In all of the tests I have applied, it is that the predominant business is not retailing. Predominantly it is selling industrial goods to industrial buyers, and they are manufacturers."

On cross examination Dr. Grathwohl seemed to lay great stress upon the use for which the product is purchased.

> "Q. Would you say if I purchased a product as a custom order, that would not be a retail purchase?
>
> A. It depends on who you are.

Q. General public?

A. It most probably would be a retail purchase.

Q. And you heard the testimony that all of the sales to the processors and the public are on the same standard; you heard that?

A. Yes.

Q. And in your opinion, the sales to the processors come in a different catgeory than the sales to the public?

A. Yes.

Q. And this size?

A. Yes.

Q. And the use of the product?

A. That is one."
(T. p. 113)

In another portion of the transcript, this point was again demonstrated:

"Q. The question is: If all the interstate purchasers, the processors and the sugar company, etc., were to quit patronizing this defendant, would it be your opinion that they would be a retail establishment under this law?

A. If the majority of the sales went to the small consumer, the general public, yes."
(T. p. 117)

With all due respect to Dr. Grathwohl's position in the academic world, several cases dealing with the

retail exemption have rejected this type of testimony.

In *Mitchell* v. *T. F. Taylor Fertilizer Works*, 233 F. 2d 284 (6th Circuit-1956), a Professor Beckman of Ohio State based his opinion upon the Standard Industrial Classification, the fact that the defendant corporation manufactured its product, and the use to which the buyer puts the product, i.e., industrial or personal use. (at pp. 287, 288) In dealing with this testimony, the Fifth Circuit Court stated the following:

> "The Secretary's argument with regard to the appellee's business is essentially that because it carries on manufacturing activities, the fact that industry members, who must be regarded as biased, consider it to be retail is of little weight. However, it is admitted that 'ice plants which manufacture the ice they sell' were regarded by Congress as typical exemptions under 213 (a)(4). (95 Cong. Rec. 14932) Thus, the testimony of the industry members on this point cannot be brushed aside as wholly without foundation; moreover, Professor Beckman's thinking, which would exclude all manufacturing from the retail exemption, and which defines manufacturing as the transforming of organic or inorganic substances into new products, would probably also exclude the ice plant, which Congress thought to be typically exempt."

In another portion of the opinion:

> "The Secretary's evidence was for the most part based on the classification of the fertilizer industry

for census and other purposes, made by general standards adopted for use in classifying all businesses. Thus, Professor Beckman, while an expert in matters relative to the census of wholesaling, did not profess any personal knowledge of the fertilizer industry. He had never been in a fertilizer plant. * * * The expert believed the matter governed by general definitions, which if Congress had so intended, could have been placed in the Act itself."

In *Boisseau* v. *Mitchell*, 218 F. 2d 734 (5th Cir.-1955), Professor Oakes of Loyola University again stressed the Standard Industry Classification Manual. He also stated that the industry under consideration was not retail in the sense in which those terms are usually applied. However, in answering these tests, this Court stated the following:

"It is most significant, however, that his entire testimony was based upon what he considered the standard definition of 'retail' sales or services—'made for the ultimate consumer for personal or family use.' This, of course, is precisely the concept which Congress repudiated in passing the 1949 amendents."

It would appear, therefore, that in the instant case the main witness for the Government was unqualified to testify as to whether the defendant was considered a retail establishment either within or without the industry, and that since Dr. Grathwohl was the principal witness for the Government, they have failed

to meet the defendant's defense on this issue. The defendant has shown that the principal case relied upon the Government, the *Kentucky Finance* case, supra, does not apply to the facts, in this case.

In addition to the arguments heretofore made, we call the Court's attention to the fact that in the congressional debates and in the committee reports the question of advancing credit or making loans was ruled out as not being a proper subject or material for retail sales. No such determination could be made with reference to the making and selling of metal products.

CONCLUSION

In summary and conclusion, the unimpeached testimony and exhibits clearly support the findings of the trial court. The findings of fact and evidence from the transcript amply support the view that the defendant is an independent employer engaged in a purely local business, serving the community's needs, with a background and history of a retail establishment. The defendant serves interstate processors incidentally and at irregular intervals, primarily when said processors are in the "down" period.

Under this statement of facts and under the authority of the *Zachry* case, supra, the defendant is not engaged in producing for or in commerce.

The defendant is firmly convinced from the facts, and the trial court so held, that it has fully met all the tests relating to a retail establishment under Sec-

tions 13(a) (2) and (4), as amended by showing:

1. That the defendant has a background and history as a retail establishment.

2. All of the defendant's sales are retail and none are for resale; all sales are made to the ultimate consumer.

3. The defendant is considered a retail establishment by both those within the industry and those outside the industry.

The defendant is therefore entitled to a judgment dismissing the above-entitled action.

Respectfully submitted,

IDAHO SHEET METAL WORKS, INC.
ELI A. WESTON, Attorney
and
VESTAL COFFIN, Associate Attorney

March, 1964

CERTIFICATE

I certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ELI A. WESTON
Attorney